



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C. 20460

OFFICE OF
GENERAL COUNSEL

November 2, 2007

Ms. Erika Durr
Clerk of the Board
U.S. Environmental Protection Agency
1341 G Street NW, Suite 600
Washington, DC 20005

Re: Deseret Power Electric Cooperative, PSD Appeal No. 07-03

Dear Ms. Durr:

Enclosed for filing with the Environmental Appeals Board in the above-referenced matter is an original and five copies of the EPA Region VIII's Response to Petition for Review, with attached exhibits, and a Notice of Filing of the Certified Index of the Administrative Record. Copies of these documents have been served on all parties in accordance with the enclosed Certificate of Service.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristi M. Smith".

Kristi M. Smith
U.S. EPA, Air and Radiation Law Office

Enclosures

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ENVIR. APPEALS BOARD

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

Deseret Power Electric Cooperative

PSD Appeal No. 07-03

ENVIRONMENTAL APPEALS BOARD

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EPA REGION VIII's RESPONSE TO PETITION FOR REVIEW

The Board should deny review in this case because the Petitioner has failed to demonstrate clear error in Region VIII's action to grant a Prevention of Significant Deterioration (PSD) permit to Deseret Power Electric Cooperative (Deseret). On the first issue raised in the Petition for Review, the Region's determination that carbon dioxide (CO₂) is not currently a regulated pollutant under the Clean Air Act (CAA or Act) is consistent with the requirements of the Act, corresponding EPA regulations, and EPA's longstanding interpretation of those regulations. Since the PSD program was established in 1977, EPA has consistently and permissibly interpreted the phrase "pollutant subject to regulation under the Act" to describe air pollutants subject to a provision in the Clean Air Act or regulations promulgated by EPA under the Act that require actual control of emissions of that pollutant. Carbon dioxide is not currently subject to such a provision or regulation, and there is no cause for the Board to reverse the Agency's established interpretation in this case. The Board should also deny review on the Petitioner's second issue because public comments did not address the reasonably

ascertainable alternatives now raised for the first time in the Petition for Review, the document relied upon by Petitioner is not contained in the administrative record, and the Clean Air Act does not require that a permitting authority study alternatives that were not raised in public comments.

Background

This case involves an appeal of a PSD permit issued by EPA Region VIII to Deseret to construct a new waste-coal-fired utility generating unit at an existing power plant near Bonanza, Utah. EPA Region VIII is the permitting authority in this action because the planned 110 megawatt unit will be located on Indian country lands within the exterior boundaries of the Uintah & Ouray Indian Reservation in northeastern Utah. *See* 40 C.F.R. §52.2346; Statement of Basis at 1 (Resp. Exhibit 1). The new unit is designed to utilize an existing waste coal stockpile at Deseret's nearby coal mine. Statement of Basis at 1; Response to Comments at 1 (Resp. Exhibit 2). The stockpile is estimated to be approximately eight million tons and would otherwise be a wasted energy resource. Statement of Basis at 9-10. Deseret plans to use the additional capacity generated by the new unit to supply electricity to several municipalities in Utah. *See, e.g.* Letter from Daniel D. McArthur, Mayor of St. George, Utah (April 25, 2007).

In June of 2006, the Region issued a proposed permit that would require Deseret to meet stringent emission limitations to satisfy the PSD requirements of the Clean Air Act. Statement of Basis at 4; Response to Comments at 1. The proposal was accompanied by a "Draft Statement of Basis," which informed interested members of the public as to the significant features of the proposed project. At the start of public comment period on the proposed permit, EPA published public notices in five

newspapers in the vicinity of the project and submitted Public Service Announcements about the proposed permit action to several local radio stations in Utah. Statement of Basis at 4; Response to Comments at 1-2. In response, EPA received public comments both in support of the Deseret project, including letters from seven Utah municipalities expressing their need for additional electrical power and stating their plan to participate in the project, and in opposition to the project, including a letter submitted by Petitioner and six other groups. Statement of Basis at 4-5; Response to Comments at 2.

Over the next year, EPA Region VIII gave careful consideration to the public comments it received, and on August 30, 2007, the Region issued a final Federal PSD air permit to Deseret to authorize the addition of a 110-megawatt waste-coal-fired boiler to the existing Bonanza power plant (Permit No. PSD-OU-0002-04.00). EPA Region VIII also issued a final "Statement of Basis" on that date, as well as a "Response to Public Comments" formally responding to public questions and comments about the project proposal and proposed permit.

Standard of Review and Scope of Review

The Board's review of final PSD permit decisions is discretionary and the Board's exercise of such discretion is circumscribed. A petitioner bears the burden of convincing the Board that review is warranted. 40 C.F.R. Part 124. Under the Board's procedural rules, review may be granted under two circumstances. First, the decision by the Regional Administrator may be reviewed if it is based on a "finding of fact or conclusion of law which is clearly erroneous." 40 C.F.R. §124.19(a)(1). Second, review may be authorized if the permit action involves "an exercise of discretion or an important policy